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**FEDERAL ELECTION COMMISSION**

999 E Street, N.W.

Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 6795

DATE COMPLAINT FILED: 3/12/14

DATE OF NOTIFICATION: 11/30/12

DATE OF LAST RESPONSE: 5/5/14

DATE ACTIVATED: 6/5/14

ELECTION CYCLE: 2010

EARLIEST SOL: 9/15/2015

LATEST SOL: 9/22/2015

**COMPLAINANT:**

Jonathon Moseley

**RESPONDENT:**

Citizens for Responsibility and Ethics in  
Washington

Melanie Sloan

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 431(4)

2 U.S.C. § 431(17)

2 U.S.C. § 434(c)

2 U.S.C. § 434(g)

2 U.S.C. § 441d

11 C.F.R. § 100.5

11 C.F.R. § 100.16

11 C.F.R. § 100.22

11 C.F.R. § 102.8

11 C.F.R. § 104.3(j)

11 C.F.R. § 104.4

11 C.F.R. § 109.10

11 C.F.R. § 110.11

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

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**I. INTRODUCTION**

This matter involves an allegation that Citizens for Responsibility and Ethics in Washington ("CREW"), violated the Federal Election Campaign Act, as amended (the "Act"), by failing to report its alleged independent expenditures to the Commission, and by failing to comply with certain reporting requirements of political committees. As discussed below, although CREW appears to have made independent expenditures, they were likely *de minimis*. Accordingly, we recommend that the Commission dismiss this matter in an exercise of prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985).

**II. FACTS**

Citizens for Responsibility and Ethics in Washington ("CREW") is a 501(c)(3) nonprofit corporation "dedicated to promoting ethics and accountability in government and public life."<sup>1</sup> The Complaint alleges that beginning on September 15, 2010, CREW launched a campaign opposing the election of Senate candidate Christine O'Donnell.<sup>2</sup> According to the Complaint, CREW violated the Act by failing to report several communications to the Commission as independent expenditures.<sup>3</sup> These communications include:

- four press releases from CREW's website<sup>4</sup>;
- Four television appearances by Melanie Sloan (two on *Anderson Cooper 360°*, one on *The Ed Show*, and one in *The Situation Room with Wolf Blitzer*)<sup>5</sup>;

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<sup>1</sup> Resp. at 8.

<sup>2</sup> Compl. at 4.

<sup>3</sup> *Id.* at 5. In arguing that CREW was required to report its activities as independent expenditures, the Complaint cites both 11 C.F.R. § 104.4 (covering independent expenditures by political committees) and 11 C.F.R. § 109.10 (covering independent expenditures by persons who are not political committees).

<sup>4</sup> Compl., Exs. B, D, E, I.

<sup>5</sup> *Id.*, Exs. C-1 to C-8 (submissions also available at <http://curesocialism.blogspot.com/2014/02/crew-complaint.html>).

- A news article appearing in the *The News Journal* discussing complaints filed by CREW with the Commission and the U.S. Attorney's Office against Christine O'Donnell<sup>6</sup>;
- An article appearing on Ricochet.com containing clips of Sloan's quotes from other sources<sup>7</sup>;
- An op-ed authored by Sloan which appeared in *The News Journal*<sup>8</sup>;
- A mass email soliciting donations to CREW<sup>9</sup>;
- CREW's 2010 Annual Report, which contains information relating to the complaints CREW filed against O'Donnell.<sup>10</sup>

The Complaint further alleges that CREW received contributions earmarked for political purposes, and that CREW was required to report them pursuant to the disclosure rules governing political committees.<sup>11</sup>

In its Response, CREW states that none of the communications identified in the Complaint qualified as express advocacy under 11 C.F.R. § 100.22(b), and thus they were not independent expenditures.<sup>12</sup> CREW further contends that the statements made by Sloan during

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<sup>6</sup> *Id.*, Ex. F.

<sup>7</sup> *Id.*, Ex. G.

<sup>8</sup> *Id.*, Ex. H.

<sup>9</sup> *Id.*, Ex. J. The Complaint also alleges that CREW "engaged in substantially identical or similar communications by the use of regular mail ("direct mail") and through other means," but it has not provided any such documents to the Commission. *Id.* at 15.

<sup>10</sup> *Id.*, Ex. K.

<sup>11</sup> *Id.* at 14-15.

<sup>12</sup> Resp. at 4-6.

1 her television appearances, in her op-ed, and to newspaper reporters are covered by the press  
2 exemption.<sup>13</sup> Lastly, CREW states that it is not a political committee.<sup>14</sup>

## 3 II. LEGAL ANALYSIS

4 The Act places certain reporting and disclaimer requirements on persons who make  
5 independent expenditures.<sup>15</sup> An "independent expenditure" is an expenditure by a person  
6 expressly advocating the election or defeat of a clearly identified federal candidate that is not  
7 coordinated with a candidate, a candidate's authorized committee, or their agents, or a political  
8 party committee or its agents.<sup>16</sup> Under the Commission's regulations, a communication  
9 expressly advocates the election or defeat of a clearly identified federal candidate if it:

10 [u]ses phrases such as 'vote for the President,' 're-elect your  
11 Congressman,' 'support the Democratic nominee,' 'cast your ballot for the  
12 Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,'  
13 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by  
14 a listing of clearly identified candidates described as Pro-Life or Pro-  
15 Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of  
16 one or more candidate(s), 'reject the incumbent,' or communications of  
17 campaign slogan(s) or individual word(s), which in context can have no  
18 other reasonable meaning than to urge the election or defeat of one or  
19 more clearly identified candidate(s), such as posters, bumper stickers,  
20 advertisements, etc. which say 'Nixon's the One,' 'Carter '76,'  
21 'Reagan/Bush' or 'Mondale!'<sup>17</sup>

22  
23 A communication also constitutes express advocacy if:

24 [w]hen taken as a whole and with limited reference to external events,  
25 such as the proximity to the election, could only be interpreted by a  
26 reasonable person as containing advocacy of the election or defeat of one

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<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> 2 U.S.C. §§ 434(c), 434(g), 441d; 11 C.F.R. §§ 109.10, 110.11.

<sup>16</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

<sup>17</sup> 11 C.F.R. § 100.22(a).

1 or more clearly identified candidate(s) because — (1) [t]he electoral  
2 portion of the communication is unmistakable, unambiguous, and  
3 suggestive of only one meaning; and (2) [r]easonable minds could not  
4 differ as to whether it encourages actions to elect or defeat one or more  
5 clearly identified candidate(s) or encourages some other kind of action.<sup>18</sup>  
6

7 Three of CREW's communications contain express advocacy. In its September 15 press  
8 release (Exhibit B), CREW states that O'Donnell has demonstrated "a disturbing pattern of  
9 fraud, lies and fiscal irresponsibility" and "a total disregard of ethics and integrity," and as a  
10 result is named to CREW's list of "Most Crooked Candidates." CREW then states that "we  
11 shouldn't have crooks, liars or frauds on the ballot and we shouldn't have to worry that the Most  
12 Corrupt Candidates will someday grow up to become the Most Corrupt Members of Congress."  
13 This is equivalent to stating "vote against," "defeat," or "reject the incumbent" and has "no other  
14 reasonable meaning than to urge" the defeat of O'Donnell.<sup>19</sup> This communication is essentially  
15 the same as one that states "'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of  
16 clearly identified candidates described as Pro-Life or Pro-Choice."<sup>20</sup>

17 Likewise, in its September 22 mass email (Exhibit J), CREW identifies O'Donnell as a  
18 thief and a crook and states, "The last thing the country needs is for one of today's Crooked  
19 Candidates to grow up and become one of tomorrow's Most Corrupt Members of Congress."  
20 The term "Crooked Candidates" also links to CREW's list of "Most Crooked Candidates," which  
21 includes O'Donnell. CREW essentially tells readers that "Crooked Candidates" should not  
22 "grow up" to be "Corrupt Members of Congress" — *i.e.*, they should not be elected. For the  
23 same reasons noted above, Exhibit J contains express advocacy.

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<sup>18</sup> *Id.* § 100.22(b).

<sup>19</sup> *Id.* § 100.22(a).

<sup>20</sup> *Id.*

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1 Similarly, CREW's September 20 press release (Exhibit E) characterizes O'Donnell as a  
2 "criminal" and a "crook" who "embezzl[ed] money from her campaign," then states that "thieves  
3 belong in jail not the United States Senate." This communication directly states that O'Donnell  
4 should not be elected to the Senate; it is comparable to a sign that says "'defeat' accompanied by  
5 a picture of one or more candidate(s)."<sup>21</sup>

6 All three of these communications contain statements that can have no other reasonable  
7 meaning than to urge O'Donnell's defeat.<sup>22</sup> The fact that the statements are "marginally less  
8 direct than 'Vote for Smith' does not change their essential nature."<sup>23</sup> The remaining  
9 communications either do not contain express advocacy<sup>24</sup> or were not made or paid for by  
10 CREW.<sup>25</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

<sup>24</sup> Compl., Exs. D, I, K. Exhibit D, a press release from September 17, 2010, calls attention to the fact that CREW has asked the Commission and the Delaware U.S. Attorney to open investigations into "O'Donnell's abuse of campaign funds." Compl. Ex. D. It does not contain any of section 100.22(a)'s "magic words," nor can it only be interpreted by a reasonable person as advocating O'Donnell's defeat – indeed, it is focused on making the reader aware of the complaints filed by CREW rather than any electoral result. Similarly, Exhibit K, an excerpt of CREW's 2010 Annual Report, discusses the fact that CREW urged investigations into O'Donnell's activities. It is not clear whether O'Donnell was a candidate at the time of the 2010 Annual Report, but in any event, the attached excerpt does not advocate for O'Donnell's electoral defeat. Exhibit I is a recap of CREW's list of "Crooked Candidates," which marks each as either "ELECTED" or "DEFEATED." Because the list appears to have been published on CREW's website in the form submitted after O'Donnell's defeat, it appears that O'Donnell was no longer a candidate at that time, and thus Exhibit I did not expressly advocate the defeat of a clearly identified federal candidate.

<sup>25</sup> *Id.*, Exs. C1 to C8, F, G, H. CREW contends that the statements made by Sloan during her television appearances (Exhibits C1 to C8), in her op-ed in *The News Journal* (Exhibit H), and to newspaper reporters (Exhibits F and G), are covered by the press exemption, but that argument is inapposite. The press exemption applies to disbursements that otherwise would be expenditures, contributions, or electioneering communications, but for the fact that they were made by a press entity acting in its legitimate press function. *See* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i); 11 C.F.R. §§ 100.132, 100.73, 100.29(c)(2); *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *see also* H.R. REP. NO. 93-1239 at 4 (1974) (press exemption's purpose is to protect "the First Amendment freedoms of the press and of association" and to "assure the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns"). Although the entities making disbursements for the production and distribution of the alleged expenditures in Exhibits C1 to C8, F, G, and

1 Not every communication containing express advocacy must be reported to the  
2 Commission. The Act requires persons who are not political committees to report independent  
3 expenditures only when they aggregate in excess of \$250 with respect to a given election in a  
4 calendar year.<sup>26</sup> In this case, the costs associated with posting two press releases on CREW's  
5 website and sending a mass email are likely *de minimis*, and unlikely to have reached the \$250  
6 reporting threshold. As the Commission has noted in its Explanation and Justification relating to  
7 Internet Communications, "there is virtually no cost associated with sending e-mail  
8 communications, even thousands of e-mails to thousands of recipients. . . ."<sup>27</sup>

9 Similarly, since the cost of the press releases and mass email did not likely surpass the  
10 \$250 independent expenditure threshold, the costs associated with these communications are  
11 even further removed from crossing the Act's \$1,000 threshold for political committee status.<sup>28</sup>  
12 Without reaching the statutory threshold for being a political committee, the Complaint's  
13 allegations that CREW was subject to certain reporting requirements as a political committee  
14 should likewise be dismissed. See 11 C.F.R. § 104.3(j) (reporting earmarked contributions); *id.*  
15 § 104.4 (independent expenditures by political committees); *id.* § 102.8 (receipt of  
16 contributions).

17 Given the *de minimis* expenses likely associated with the email and press releases and the  
18 low probability that the cost of CREW's activities reached either statutory threshold, it would not

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H would have been entitled to the press exemption were they the subjects of an alleged violation of the Act, they are not respondents in this matter. Therefore, a press exemption analysis is not necessary to conclude that CREW did not make an expenditure with respect to those communications, as any such expenditure would be by those entities, not CREW.

<sup>26</sup> 11 C.F.R. § 109.10(b).

<sup>27</sup> 71 Fed. Reg. 18,594, 18,596 (Apr. 12, 2006) (explaining why email is not a form of "general public political advertising").

<sup>28</sup> See 2 U.S.C. § 431(4); 11 C.F.R. § 100.5.

1 be a prudent use of Commission resources to pursue an investigation. Accordingly, consistent  
2 with the Commission's treatment of other matters involving similarly inexpensive e-mail and  
3 internet-related disbursements,<sup>29</sup> we recommend that the Commission dismiss this matter in an  
4 exercise of prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985).


5 **IV. RECOMMENDATIONS**

- 6 1. Dismiss this matter pursuant to the Commission's prosecutorial discretion.  
7  
8 2. Approve the attached Factual and Legal Analysis.  
9  
10 3. Approve the appropriate letters.  
11  
12 4. Close the file.  
13

14  
15 8/20/14  
16 Date

17  
18   
19 Daniel A. Petalas

20 Associate General Counsel for Enforcement

21   
22 William Powers

23 Assistant General Counsel

24  
25   
26 Peter Reynolds

27 Attorney  
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<sup>29</sup> See, e.g., Factual & Legal Analysis at 6, MUR 6173 (PRI Inc.) (express advocacy newsletter distributed by e-mail and website dismissed as *de minimis*); Statement of Reasons of Comm'rs Thomas, Toner, Mason, McDonald & Weintraub, MUR 5491 (Jerry Falwell Ministries, Inc.) (express advocacy newsletter distributed by e-mail and website dismissed as *de minimis*); see also MUR 6247 (www.examiner.com) (alleged in-kind contributions by host website to paid blogger who regularly posted about his candidacy dismissed as *de minimis*).